No. 20,585

IN THE

United States Court of Appeals

For the Ninth Circuit

ANITA T. OWENS,
Appellant,

vs.

RAYMOND WHITE, JOHN C. McCARTER, ALFRED POPMA, and ST. LUKE'S HOSPITAL, a corporation,
Appellees.

Appeal from Summary Judgment of Dismissal
of the United States District Court
for the District of Idaho,
Southern District
Honorable Ray McNichols, Judge

APPELLANT'S CLOSING BRIEF

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STATEMENT OF JURISDICTION

This is an appeal from Summary Judgment granted on behalf of Appellees. Jurisdiction of the United States District Court for the District of Idaho, Southern District, was properly invoked, the Trial Court having jurisdiction of the action under 28 U.S.C.A., Section 1332, the parties being citizens of different States and the amount in controversy exceeding the sum of $10,000.00, exclusive of interest and costs. This

Honorable Court has jurisdiction to review the order and judgment entered by the District Court under the provisions of 28 U.S.C.A., Section 1291.

STATEMENT OF THE CASE

In a prior appeal to this Honorable Court, a judgment of dismissal on the grounds that the Statute of Limitations had run against plaintiff's claim was reversed. (342 F. 2d 817.) Thereafter, pursuant to certain language found in the prior opinion of this Honorable Court, the District Court held an evidentiary hearing on June 2, 1965, to determine the applicability of the "Discovery Rule". In a Memorandum Decision, filed on June 22, 1965, the District Court rendered Findings of Fact and Conclusions of Law, determining that the "Discovery Rule" ought not to be applied in this case to determine the date of accrual of Appellant's claim. Findings, conclusions and a joint order adverse to Appellant herein was filed on July 19, 1965. By leave of Court, Appellant filed an amended complaint and Appellees moved for summary judgment. The motion was granted and, on September 22, 1965, the District Court entered its judgment of dismissal with prejudice.

The pertinent allegations of the amended complaint are summarized in Appellant's Opening Brief, at pages 3, 4 and 5.

The individual Appellees were employed by Appellant to examine and diagnose a lump in her left breast. During August of 1951, on advice of Appellee

Popma, Appellant submitted to a biopsy performed by Appellee White. Initially, Appellant was informed by Appellee White that the tissue removed during the biopsy was not cancerous; she was later informed that the removed tissues did contain a malignancy and that a certain surgical procedure known as a "radical mastectomy", involving the removal of the left breast and the stripping away of the lymph glands from under her arm, was necessary. Such procedure was performed. In fact, the tissue removed during the biopsy contained no malignancy. Not until the Fall of 1962 did Appellant discover the mistake in diagnosis and that the surgery was unnecessary; prior to the said time, Appellant was not aware of any fact which could put her on inquiry or give her notice that the lump in her breast was in fact benign. There are four claims for relief set forth in the amended complaint. The first claim for relief alleges negligence in the examination and analysis of the tissue taken during the biopsy and negligent misdiagnosis. The second claim for relief alleges a further negligent failure to use due and proper care in making the diagnosis. The third claim for relief alleges negligence in conducting the examination and analysis of the tissue taken during the biopsy. The fourth claim for relief alleges that extensive radiation treatments to which Appellant was subjected following the surgery were unnecessary and occasioned by the negligent and careless misdiagnosis.

This, Appellant's Closing Brief, will deal entirely with the issues of applicability of the "Discovery

Rule". So much of the Opening Brief as dealt with the coverture of Appellant and the absence of one of the Appellees from the State of Idaho is incorporated herein by reference, but will not be repeated.

STATEMENT OF FACTS

In Appellant's Opening Brief, at pages 6 through 14, a careful and detailed statement of the evidence adduced at the June 2, 1965 hearing was set forth. Appellant hereby incorporates by reference that Statement of Facts. Further references and citations to the Transcript will be supplied only as necessary during exposition of the argument.

SPECIFICATIONS OF ERROR

I. The evidence is legally insufficient to support the findings of fact entered by the Court.

II. The Trial Court applied an erroneous legal standard in determining the applicability of the "Discovery Rule".

III. The Trial Court erred in granting the motion to dismiss.

ARGUMENT

I

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE FINDINGS OF FACT ENTERED BY THE COURT

A

The Applicable Standard of Proof

In our Opening Brief, we contended that some, but not all, of the findings of fact entered below were supported by insufficient or no evidence. Further, it was demonstrated that it was error for the District Court to resolve conflicting reasonable inferences from the undisputed facts in favor of Appellees and against Appellant herein. A single Brief has been filed on behalf of Appellees White, McCarter and Popma; Appellee St. Luke's Hospital has filed a separate Brief. The former of the two briefs contends (pages 2 and 3) that if there be any support, "however meager" for the findings of the Trial Court, they must be sustained, citing numerous Idaho cases dealing with Appellate review of judgments rendered at trial.

Appellees White, McCarter and Popma say (Brief, pages 7, 8 and 9) that Appellant consented to consideration of the Statute of Limitations upon motion for summary judgment. In this, they are entirely correct. Appellant does not now, nor has she previously, claimed that the matter could not be raised by motion for summary judgment. In this regard, see Appellant's Opening Brief, page 17, wherein Appellant, with citation of authority, conceded that the device of summary judgment was available, but denied that it had been properly applied. Appellee St. Luke's

Hospital (Brief, pages 14 and 15) also misreads Appellant's Opening Brief, saying that Appellee asserts that the defense of Statute of Limitations must be raised by answer. Such an assertion would be incorrect; we do not now, nor have we ever, taken this position on appeal.

Although wide of the mark as an attempt to meet Appellant's Opening Brief, Appellees' arguments do raise a significant issue which must be resolved in this appeal. Was the District Court authorized to sever the issue of Statute of Limitations, try the issue without a jury, resolve conflicting issues of fact and of the inferences to be drawn therefrom, and grant summary judgment in the face of the existence of genuine disputed issues of fact and inferences to be drawn therefrom? In testing the sufficiency and adequacy of the evidence to support the District Court's determinations, must this Court utilize the general rule applicable to review of summary judgments or, on the other hand, apply the rule pertaining to review of a full-fledged trial?

No doubt, under Rule 42(b), Federal Rules of Civil Procedure, the District Court was authorized to sever the issue of Statute of Limitations for separate trial. Indeed, in view of the language contained in the prior opinion of this Honorable Court, it could scarcely have done otherwise. Was the District Court, however, bound or authorized to decide the issues as a trier of fact, upon the preponderance of the evidence? If it was, then in view of the usual presumption of correctness, the appellate test would be whether

the findings of the District Court are supported by any substantial evidence. Thus, the correctness of the appellate test contended for by Appellees rests upon a determination as to whether the Trial Court could, without a jury, apply a preponderance of the evidence test, as opposed to the usual rule on summary judgment motions.

Ordinarily, under Rule 56, Federal Rules of Civil Procedure, summary judgment may be granted only where the moving party is entitled to judgment as a matter of law and there is no genuine issue of fact remaining for trial. *Sartor v. Arkansas Natural Gas Corporation,* 321 U. S. 620, 627, 64 S. Ct. 724, 88 L. Ed. 967 (1944); *Poller v. Columbia Broadcasting System,* 368 U. S. 464, 468, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962). The moving party ordinarily has the burden of showing clearly that there is no genuine issue of fact. The function of the Trial Court is to determine whether such issue exists, not to resolve it. *Byrnes v. Mutual Life Insurance Company of New York,* 217 F. 2d 497, 9th Cir., 1954.

Appellant, in accordance with Rule 38(b), Federal Rules of Civil Procedure, demanded a jury trial both in her original and first amended complaints. This is a diversity action and, accordingly, the right to a jury trial under the Seventh Amendment to the United States Constitution is determined as a matter of Federal, rather than State, law. *Simler v. Conner,* 372 U. S. 221, 222, 83 S. Ct. 609, 9 L. Ed. 2d 691 (1963).

> "Only through a holding that the jury-trial right is to be determined according to Federal law can

> the uniformity in its exercise which is demanded by the Seventh Amendment be achieved . . ."

Ibid. at page 222.

That a party who has demanded trial by jury is entitled to a jury trial on the issue of the Statute of Limitations is not a novel proposition. *Ingo v. Koch,* 127 F. 2d 667, 2nd Cir., 1942. Where a suit is triable as of right by a jury, then a defense of Statute of Limitations which tenders genuine issues of fact is also triable as of right by a jury. *Bertha Building Corporation v. National Theater Corporation,* 248 F. 2d 833, 835, 2nd Cir., 1957.

Even though, under the provisions of Rule 42(b) of the Federal Rules of Civil Procedure, severance of an issue for separate trial be proper, such device may not be utilized to deprive a party of jury trial on the severed issue. *Marks Food Corporation v. Barbara Ann Baking Company,* 274 F. 2d 934, 936, 9th Cir., 1960.

It might be contended (and, indeed, Appellant understands this to be an unstated premise of Appellees' position) that, once the District Court resolved disputed issues of fact and disputed inferences therefrom, summary judgment became proper, as no genuine issue of fact *thereafter* remained. This, however, would authorize a Trial Court to make hearing of a motion for summary judgment a two stage proceeding. At the first stage, the Trial Court would sit as a trier of fact, divorced from any of the usual governing rules applicable to summary judgment. In the

second stage, giving lip service to the right to jury trial and Rule 56, the Court would grant summary judgment, based upon its prior fact-finding.

In *Beacon Theaters v. Westover,* 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959), the plaintiff brought a declaratory relief action, praying a declaration that its acts were not in restraint of trade and for an injunction preventing the defendant from instituting suit. The defendant, asserting counterclaims and cross-claims for damages for restraint of trade, demanded a jury trial pursuant to Rule 38(b) of the Federal Rules of Civil Procedure. Thereafter, on plaintiff's motion, the Court severed the issues raised by the complaint, under Rule 42(b) of the Federal Rules of Civil Procedure, effectively denying to defendant the right of jury trial. The Supreme Court of the United States, upon appeal from the Court of Appeals for the Ninth Circuit, held that while the Trial Court undoubtedly possessed discretion under Rule 42(b), this discretion could not be so exercised as to deprive a party of a jury trial. *Beacon Theaters v. Westover,* supra, 359 U.S. 508.

The device attempted in *Beacon Theaters v. Westover,* supra, could not suffice to deprive a party of the right of jury trial. Certainly a two-stage summary judgment proceeding cannot be so utilized.

It may at times be difficult to determine whether a particular question is one of law or of fact. Nevertheless, where a party has a right to trial by jury upon a possible issue of fact, the courts should be extremely cautious that this right be not denied. *Cox v. English-*

American Underwriters, 245 F.2d 330, 332, 9th Cir. 1957.

This Honorable Court, in its prior opinion (342 F.2d 819) indicated that whether plaintiff's claim had accrued was a question of law. In support of this proposition, the case of *Chemung Mining Company v. Hanley,* 9 Idaho 786, 77 Pac. 226 (1904) was cited. In that case, a suit in equity seeking to establish a trust, the defendant initially demurred, setting up the Statute of Limitations. The demurrer was overruled. The answer also pleaded the statute. Thereafter, defendant moved for judgment on the pleadings. Plaintiff tendered an amended complaint. Judgment on the pleadings was granted. In reversing the judgment of dismissal, the Court stated, inter alia:

> ". . . facts which constitute a cause of action do not cease to be facts simply because of the application of the statute of limitations. When the plaintiff states his cause of action in such a manner that it appears upon the face of his pleading that the action is barred, he takes his chances of being met with a demurrer setting up the bar of the statute. In that event, he must rest upon his pleading or amend. On the other hand, if the plea is raised in the answer, *then an issue of fact arises, and he is entitled to go upon his proofs . . .*" (Emphasis supplied.)
>
> *Chemung Mining Company v. Hanley,* supra, 77 Pac. 228.

> ". . . again, when the defendant pleads in his answer that the plaintiff's cause of action is barred, the statute (Section 4217, Rev. Sp. 1887)

immediately interposes and gives the plaintiff specific denials to each and every such allegation . . . (Citations omitted) . . . *The facts constituting that bar must be proven the same as any other facts in the case . . .*" (Emphasis supplied.)

Chemung Mining Company v. Hanley, supra, 77 Pac. 228.

". . . the case stood upon complaint and answer, *and every material fact pleaded in the case was at issue, and the proofs in support of those issues should have been heard . . .*" (Emphasis supplied.)

Chemung Mining Company v. Hanley, supra, 77 Pac. 229.

The *Chemung Mining Company v. Hanley* case, supra, was a suit in equity. Therefore, it is obvious that the Court was not referring to trial by jury. However, in a jury case, the issue would be properly triable by jury. Indeed, it is noteworthy that this is precisely what would happen in those jurisdictions committed to the "Discovery Rule". See, e.g., *Tell v. Taylor,* 191 C.A.2d 266, 12 Cal. Rptr. 648 (1961); *Garlock v. Cole,* 199 C.A.2d 11, 18 Cal. Rptr. 393 (1962), in each of which the Court pointed out that the test on motion for summary judgment raising the statute was whether there existed a triable issue of fact.

This Honorable Court (342 F.2d 819) further noted that McCormick, Evidence, Section 53 (1954) emphasized the "unrealistic" nature of expecting the jury to adjudicate the questions of limitations as well as those of the merits. In view of the mandate of the Seventh

Amendment, fears that a jury might improperly decide a question are no basis for deprivation of jury trial. See, e.g., the scholarly discussion in *Ingo v. Koch,* supra.

In our Opening Brief, we cited authority that the prior opinion in this case was the "law of the case" only as to the District Court. It did not forbid questioning the correctness of certain aspects of that opinion. Without citation of any authority, each of the Appellees contends that the prior opinion is now binding. This is erroneous. *Messinger v. Anderson,* 225 U.S. 436, 444, 32 S. Ct. 739, 56 L. Ed. 1152; *Reynolds Spring Company v. L. A. Young Industries,* 101 F.2d 257, 259, 6th Cir., 1939; *Lumbermen's Mutual Casualty Company v. Wright,* 322 F.2d 759, 763, 5th Cir., 1963.

Neither the prior Appellate Opinion in this case nor the action of the District Court could properly deny Appellant her right to jury trial. The question of when Appellant's claim accrued is a mixed question of law and fact. It could not be decided by the District Court alone unless, upon motion for summary judgment, there existed no triable issue of fact. The standard which the District Court should have applied in making its ruling was whether a triable issue of fact existed. The standard which this Honorable Court must apply in reviewing the District Court's decision and its findings of fact is not whether there is some meager evidence to support the District Court's determination, but rather whether Appellees carried their burden of clearly showing that no triable issue of fact existed.

B

The Facts and Inferences Which Should Have Been Found

Appellees have gone to great length to demonstrate the correctness of all of the findings of fact rendered by the District Court. Not all of these findings were or are attacked.

The second finding, to the effect that Appellant remained, during all of the time after surgery, actively in the nursing profession, working in hospitals, is manifestly incorrect. The sole evidence on point was Appellant's testimony. Between 1952 and 1956 she did not work at all. (R.T. 114:7-20.) This second finding also is that Appellant was active in cancer prevention work. It is misleading. Her cancer prevention work consisted only of organizing volunteers and collecting money. (R.T. 183:13-25.) It certainly did not include any scientific studies or the acquisition of any degree of expertise in the field of pathology.

The tenth finding of fact, to the effect that the tissue section slides are now deteriorated to some degree, is misleading. There was testimony that Appellee McCarter was able, a few weeks prior to hearing, to reach a diagnosis from examining the slides. (R.T. 254.) To the extent that this finding indicates prejudice to Appellees, it errs by not including the undeniable fact that diagnosis is still possible from these slides.

The twelfth finding of fact, to the effect that Appellant did not rely solely on Dr. White for medical advice and treatment, and that there was not a continuing relationship of doctor and patient, is incom-

plete and misleading. The testimony was that, in the field of cancer, more particularly in relation to her particular medical situation vis a vis the breast surgery, Appellant relied upon Dr. White and his advice until she consulted Dr. Shaw in 1962.

At pages 23 through 25 of Appellant's Opening Brief, we set forth the reasons why Appellant's proposed findings of fact numbered 2, 3, 11, 12, 13, 20, 22 and 23 should have been adopted. Without reiterating here the evidence in support of those proposed findings, it should be stressed that they do not, as contended by Appellees in their briefs, constitute mere quibbles. Rather, these findings would have made clear that Appellant had trust and confidence in her doctors, that she was neither equipped nor competent to read tissue section slides, nor to act as a pathologist or diagnose cancer. Further, these proposed findings would have emphasized the fact, admitted by Appellee White in his testimony, that he stressed to Appellant that she had had cancer and, indeed, advised the thyroidectomy because of her prior history of cancer. Further, these proposed findings would have established that Appellant had no notice of the misdiagnosis until she was advised by Dr. Shaw in 1962.

Application of the proper evidentiary test at the District Court level, coupled with application of the proper appellate test, would bring before this Honorable Court a fact pattern showing the following:

(1) Appellant submitted to a radical mastectomy, upon advice of Appellees, believing that she suffered from cancer.

(2) Appellant submitted to extensive radiation treatments, believing that she had cancer.

(3) Appellant was not qualified or competent to read the tissue section slides from which the misdiagnosis of cancer had been made.

(4) Appellant was repeatedly told by Appellee White that she had cancer.

(5) In 1962, solely in connection with a change of doctors by Appellant, Dr. Shaw caused the tissue section slides to be re-read by a qualified pathologist.

(6) In 1962, upon re-reading, it was discovered that the tissue section slides did not reveal the existence of cancer.

(7) This was the first notice which Appellant had that the original diagnosis and reading of the slides was in error.

(8) All of the doctors who participated in the original diagnosis and surgery are living and available to testify.

(9) All records, reports, etc., of the original diagnosis and surgery are available.

(10) The tissue section slides are somewhat deteriorated, but are in sufficiently good shape that Appellee McCarter was able to reach a diagnosis from them in May or June of 1965.

The fact pattern above referred to completely vitiates any argument that Appellant slept upon rights (the existence of which were unknown to her) or that there

is any prejudice to the Appellees sufficient to warrant denial to Appellant of her day in court.

For the reasons set forth above, it is very respectfully submitted that the District Court applied an erroneous standard of proof, that the appellate test contended for by Appellees is erroneous, that Appellant was deprived of her right to jury trial and that, accordingly, the judgments rendered below cannot stand.

II

THE TRIAL COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN DETERMINING THE APPLICABILITY OF THE "DISCOVERY RULE"

In our opening brief, at pages 28 and 29, we pointed out that the District Court had specifically concluded as a matter of law:

> "That plaintiff *could* have by exercise of due diligence, discovered the alleged malpractice at any time after the surgery and treatment complained of." (Emphasis supplied)

The governing Idaho law, as contained in *Billings v. Sisters of Mercy of Idaho,* 86 Idaho 485, 389 P.2d 224 (1964) is:

> ". . . the cause of action does not accrue until the patient learns of, or in the exercise of reasonable care and diligence *should* have learned of . . . the alleged malpractice." (Emphasis supplied)
>
> *Billings v. Sisters of Mercy of Idaho,* supra, 389 P.2d at 232.

Appellee St. Luke's (Brief, p. 31) contends that the difference between the Idaho standard and that applied by the District Court is a mere quibble Not so.

The District Court's seventh finding of fact was:

> "That plaintiff knew at all times that the defendant hospital records and the slides on which the diagnosis was predicated were available for her examination at her simple request."

The eighth finding of fact was:

> "For a period of eleven years from the date of the surgery, she made no investigation to determine the accuracy of the diagnosis on which the surgery was based."

Nowhere in the District Court's findings of fact is there any finding that Appellant, prior to 1962, knew or suspected that Appellees' original diagnosis of cancer had been in error. Nowhere did the District Court find any fact to have been communicated to her prior to 1962 which put her on notice or required investigation. The difference between "could" and "should" is material; the District Court believed that if Appellant *could* at any time have asked for an independent pathological review of the tissue section slides, this was sufficient to bar her claim.

There has never been any assertion by Appellant that it was impossible for her to have the slides read by an independent pathologist. It was always possible. But there was no reason for her to make the request. The test as to whether a plaintiff is put upon inquiry

is not whether an inference of the defendant's negligence could conceivably have been drawn from the data available, but whether, from that data, there arose a conclusion of negligence which a reasonable person would be *required* to reach. *Bowman v. McPheeters,* 77 C.A.2d 795, 802, 176 P.2d 745 (1947). The test is whether, upon the facts known to plaintiff, a prudent person would believe there to be cause for investigation. *Mock v. Santa Monica Hospital,* 187 C.A.2d 57, 66; 9 Cal. Rptr. 555 (1960).

The same rule is applied in *Hundley v. St. Francis Hospital,* 161 C.A.2d 800, 327 P.2d 131 (1958), cited and relied upon by this Honorable Court in its prior opinion. (242 F.2d at 820). Plaintiff's ovary and fallopian tube were removed because of a diagnosis of cancer, which diagnosis was negligently incorrect. Following verdict and judgment for plaintiff, defendant appealed, contending that the statute of limitations had run. One of the bases for affirmance was that knowledge of the misdiagnosis had not come to plaintiff until within the statutory period. Parenthetically, in this case, the issue of limitations had been left, in accordance with the law in "Discovery Rule" states, to the jury.

Examining the District Court's findings of fact, matching them to the conclusions of law and the decision rendered, the conclusion is inescapable that the District Court believed that it was sufficient to bar Appellant's claim that she was physically able to obtain the tissue section slides. This is not the rule. Appellant's claim did not accrue until she possessed

knowledge or information which would require a reasonably prudent person to believe that there had been a negligent misdiagnosis. The difference between the proper rule and that applied is no mere quibble; it is the heart of the case.

III

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS

Appellees have each contended that the prior appellate opinion in this case (342 F.2d 817) is the "law of the case". Each has advanced this argument without citation of authority. Each is in error. The authorities and the correct rule are set forth in our argument under the first subheading.

In our Opening Brief, at pages 35 through 52, the "Discovery Rule" as developed in states other than Idaho, was extensively analyzed. Uncontroverted by Appellees herein, that analysis will not now be repeated.

This Honorable Court, in its prior appellate opinion, held that Idaho would apply the "Discovery Rule" to medical malpractice cases outside the foreign object field. The District Court, at least, apparently interpreted this opinion as indicating, however, that factors listed in the prior opinion (342 F.2d at 820) such as the continuing relationship of doctor and patient, prejudice to the defendant, relative difficulty of proving the wrong, and availability of witnesses

and records would be considered in determining whether the "Discovery Rule" should be applied. In our Opening Brief, the Court's citations of authority were analyzed to show that these were all factors which operated *within* the "Discovery Rule", rather than in determining whether to apply it.

Counsel's research has unearthed no "Discovery Rule" decision in which a reasonably diligent plaintiff, first on notice of the doctor's negligence within the prescriptive period, has been barred.

For the first time on appeal, Appellee St. Luke's (Brief, p. 33) contends that the initial advice by Appellee White that there was no cancer, followed by his statement a day or two later that there was cancer, should have alerted anyone to the danger of negligence. Further, it is contended that the advice that the tissue removed during the radical mastectomy contained no malignant cells gave Appellant "constant notice that the diagnosis might be wrong".

Appellee White actually testified as follows:

> "Q. Do you recall whether, following the biopsy, you did in fact tell the plaintiff that there was no malignancy? That is to say, it looked like it was benign, the lesion?"
>
> A. I told the patient after she recovered from the anesthesia, etc., that gross examination of this tissue removed by biopsy, that is, the tumor mass per se, that it appeared to be benign, but that we would have to wait until the microscopic sections were in, as routine surgical practice in any institution, in order to have a final diagnosis."
>
> (R.T. 194:8-17).

Appellee White later, in accordance with the report of the tissue section analysis, told Appellant that the tissue removed by biopsy was malignant. This would in no way serve to alert her to possible negligence.

It is asserted that the lack of malignancy in the tissues removed in the radical mastectomy should have alerted Appellant to possible negligence. Appellees offered no testimony indicating or tending to indicate that such lack of malignancy would indicate error in the original diagnosis. Further, the assertion ignores the testimony of Appellant that Appellee White told her, following the radical mastectomy, that it appeared that they had gotten all of the malignant tissue. (R.T. 116:13-25.) It ignores Appellee White's testimony that he told Appellant that she had cancer.

It is useless to debate terms such as "due diligence" and "unconscionable delay" based upon a record which shows no fact which would or could have made Appellant suspect the negligence of Appellees. It would be a strange rule indeed—and stranger still when contended for by representatives of the medical profession—that required the patient to constantly question the judgment of her doctors; that required a patient upon leaving the care of one doctor to ask the next for an investigation to ascertain possible negligence by the first. Such a rule would destroy every conceivable and rational foundation for a fruitful doctor-patient relationship.

Lastly, Appellee St. Luke's (Brief, p. 8) complains that no notice of claim was given to any of the Appellees prior to filing of suit. No authority has been cited

that such a claim is necessary. Nevertheless, it is instructive to notice that Appellee McCarter, the pathologist, did receive a letter from Dr. Shaw setting forth the Stanford Medical School diagnosis in 1962. (R.T. 73:15-25; Exhibit 9.) Appellees objected to any testimony as to whether the contents of that letter were communicated by Dr. McCarter to any of the other Appellees. As far as the evidence reveals, Appellee McCarter did, in response to this letter, exactly nothing, i.e., precisely what Appellees criticized Appellant for having done up until the time she was informed that the original diagnosis was wrong.

It is very respectfully submitted that the only proper standard to be followed in ruling on a motion for summary judgment in this case was: there being disputed inferences from undisputed facts and a dispute as to the facts themselves, the motion should have been denied. *Tracerlab, Inc. v. Industrial Nucleonics Corporation,* 313 F.2d 97, 1st Cir. (1963); *R. J. Reynolds Tobacco Company v. Hudson,* 314 F.2d 776, 5th Cir. (1963); *Sheets v. Burman,* 322 F.2d 277, 5th Cir. (1963).

Even on the factors found by the District Court, there was no lack of diligence, no fact or circumstance which required Appellant to do anything more than, as a good patient, rely upon the original advice of her doctors.

Idaho would apply the "Discovery Rule" outside the foreign object field. Appellant falls well within the ambit of that rule. The District Court's failure to afford to Appellant the benefit of that rule constituted prejudicial error.

CONCLUSION

It is very respectfully submitted that Appellant herein was denied her right of trial by jury, that an erroneous standard of proof was applied, that a material error as to the applicable law was made and that, on the record before this Honorable Court, the judgment rendered below cannot stand and must be reversed.

Dated, San Francisco, California,
June 9, 1966.

Respectfully submitted,
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VERNON K. SMITH,
By MELVIN M. BELLI and
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FREDERICK A. CONE.